DOCUMENT RESUME

ED 284 215 CS 210 541

AUTHOR Bernstein, James M.
TITLE Was Warren Burger Richard Nixon's Revenge? A Study of the Chief Justice's Attitudes toward the News Media.
PUB DATE Aug 87
NOTE 23p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (70th, San Antonio, TX, August 1-4, 1987).
PUB TYPE Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Constitutional Law; *Court Litigation; Court Role; *Freedom of Speech; *News Media; News Reporting
IDENTIFIERS *Burger (Warren E); First Amendment; *Judicial Attitudes; Media Role; Supreme Court

ABSTRACT

The suggestion that Warren Burger's appointment to the Supreme Court was Richard Nixon's revenge upon the press is supported by some of Burger's judicial decisions and attitudes toward the press outside the courtroom, but not all of his decisions were against the news media. Burger's decision not to allow court clerks to speak to reporters, and not to allow the press to use television cameras or tape recorders to record his 1970 address to the American Bar Association seems to support the idea that, like Nixon, Burger had a great deal of contempt for the press. Additionally, Burger was hesitant to expand the constitutional privileges of journalists in his interpretation of the First Amendment, seen in his decision in the "Branzburg v. Hayes" source confidence case, the landmark libel case "Gertz v. Robert Welch," and in "Houchins v. KQED," where Burger's opinion provided no guarantee that the news media would have access to prisons. Yet Burger's decision in "Miami Herald v. Tornillo" helped the press by ruling that a newspaper's content was the business of journalists. Burger's criticism of the New York Times over the Pentagon Papers convinces many of his antagonism toward the press, but two of his decisions allowed the press to attend trials. Burger had strong, controversial opinions about the role of the press, but evidence suggests he separated his personal beliefs from the actions he took in court. (Four pages of notes are included.) (JC)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

ED284215

WAS WARREN BURGER RICHARD NIXON'S REVENGE?
A Study of the Chief Justice's Attitudes Toward the News Media

By

James M. Bernstein

School of Journalism
University of Oregon

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

James M. Bernstein

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

A paper presented to the Law Division of the Association for Education in Journalism and Mass Communication, San Antonio, Texas, August 1987.

CS210541

BEST COPY AVAILABLE

WAS WARREN BURGER RICHARD NIXON'S REVENGE?

Though Warren Burger was once portrayed as "one of the best friends of the press, constitutionally,"[1] charges of an anti-press attitude in First Amendment decisions made by Burger and the Burger Court in the 1970s and 1980s have been far more frequent among professional journalists.[2] Legal and journalism scholars have also suggested that the Court generally was not supportive of the press during the tenure of Chief Justice Warren Burger.[3] Most of these criticisms have examined the Court as a whole, although some exceptions exist.[4] The one exception dealing with Chief Justice Burger found statistical evidence that Burger showed "a desire to play a key role in determining the level of press freedom in the United States" by assigning himself the majority opinion authorship of press freedom cases to a greater extent than he assigned himself the majority opinion in other cases.[5] Schwartz further suggested a more traditional, qualitative analysis of the Burger press freedom opinions to supply additional insight into his influence.[6]

Burger's recent retirement has provided a timely opportunity to analyze his opinions in press freedom cases and to determine whether the chief justice took an anti-press position during his tenure. The analysis in this study is limited to cases in First Amendment areas that most directly affect the work of journalists: libel, free press/fair trial, prior restraint, and limitations on news-gathering. It does not include, therefore, analysis of obscenity cases, in which Burger may have had influence,[7] but which have not

directly affected the way journalists do their jobs. The study includes Burger's majority opinions and his concurring and dissenting opinions because they contain some his most poignant commentary on the press.

In addition to the analysis of the opinions, the study will also look at Burger's attitudes toward the press outside the courtroom, where, it is believed, Burger displayed his most visceral reactions. Chief Justice Burger's attitudes toward the press were often portrayed in the context of ceremonial events (for example, appearances at annual meetings of the American Bar Association). Whether indicative of his true beliefs, these reactions may not be reflected in his court opinions. The study will make a comparison in hopes of determining coincidence. The study is put into perspective with background of the events leading up to Burger's appointment.

BACKGROUND

The main assertion of Burger critics has been that the chief justice was another contribution to Richard Nixon's anti-press legacy. Candidate Nixon established the legacy in 1962 ("You won't have Nixon to kick around anymore.") following his defeat in the California gubernatorial election and continued it throughout his presidency.[8]

The critics have been able to make a strong case. Burger is said to have set the tone for the entire court.[9] And Nixon

himself said chief justices have "more profound and lasting influence on their times and on the direction of the nation than most presidents."[10]

Even before his election in 1968, Nixon the candidate injected the nation's highest court into partisan politics. He showed no hesitancy in 1968 toward emphasizing "law and order" as a campaign issue. Nor did he abstain from bringing the Supreme Court led by Earl Warren into the political arena, criticizing the court before a nationwide television audience as he accepted his party's nomination for president:

> And tonight it's time for honest talk about the problem of order in the United States. Let us always respect, as I do, our courts and those who serve on them, but let us also recognize that some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces in this country.
>
> Let those who have the responsibility to enforce our laws, and our judges who have the responsibility to interpret them, be dedicated to the great principles of civil rights. But let them also recognize that the first civil right of every American is to be free from domestic violence. And that right must be guaranteed in this country.[11]

Nixon believed the Supreme Court under Chief Justice Earl Warren had gone too far in its interpretation of the law, especially those laws pertaining to civil rights and the rights of those accused of crimes. Part of his campaign's so-called "Southern strategy" involved chiding the court for its decisions, thereby appealing to conservative Southern Democrats. The South had been greatly affected by high court decisions expanding the rights of blacks. Clearly Nixon would appoint justices who could

be considered strict constructionists, perhaps reversing the activist trend of the Warren Court.[12]

The strategy paid off. Nixon won a close race due in some part to victories in Southern states. Six months later he seemed to have repaid his political debts by making good on his promise about the Supreme Court appointment. President Nixon's nomination of Warren Burger as chief justice of the United States seemed to have surprised few; reporters were among those who expected Nixon to appoint someone whose views were similar to his own. In his next-day profile of Burger, New York Times reporter Sidney Zion said the chief justice-designate had been an outspoken critic of Earl Warren, as had Nixon:

> The newly designated chief justice would do all he could to turn the Supreme Court away from the direction set by his predecessor.[13]

Other stories also portrayed Burger as "Nixon's man." Robert Semple of The New York Times reported praise for the appointment from Republicans and Southerners on the Senate Judiciary Committee and implied Burger was a conservative on "law-and-order" issues.[14] On the eve of the Burger Court's first term, the director of the Washington Journalism Center, Julius Duscha, wrote a profile of Burger, the theme of which dwelled on the chief justice's constructionist viewpoint. "In Burger," Duscha said, "the president seems to have gotten the kind of man he wanted."[15]

If in fact President Nixon had gotten "his man," could one have blamed journalists for thinking that their worst fears were soon to be realized? Many journalists considered their

Washington colleagues more liberal politically than others in the country,[16] a viewpoint that was deeper and more widespread in the late 1960s and early 1970s.[17] Clark wrote that "the adversary and advocacy journalism of the 1960s developed simply because that was what valued members of news organizations wanted to do."[18] Though not initially of great interest to many news consumers, issues such as civil rights and Vietnam dominated the news because reporters took interest in them, Clark wrote.[19] Given this hypothesis, it seems possible that journalists may have considered the threat to liberal causes from a conservative chief justice a threat to them, also.

Was this fear of danger to press rights, whether direct or indirect, justified? A look at Burger's reactions to the press outside the courtroom may provide a partial answer.

BURGER OUTSIDE THE COURTROOM

If first impressions were lasting ones, Warren Burger definitely got off on the wrong foot with the news media in early 1970. Throughout their behind-the-scenes look at the Burger Court, Armstrong and Woodward portrayed the chief justice as being overly concerned with restoring the mystique of the Supreme Court. This meant preventing clerks from speaking to reporters in order to maintain secrecy, but it also meant Burger's performing ceremonial duties and taking on social responsibilities,[20] such as giving speeches.

Burger's annual "State of the Judiciary" speech was the chief justice's equivalent of the State of the Union speech. His

first one, delivered to the American Bar Association annual meeting in Atlanta in February 1970, attracted a great deal of interest from the news media, perhaps too much for Burger. Before giving the speech, Burger had requested that ABA leaders prevent the broadcast news media from covering the address with cameras and tape recorders. The request and ABA acquiescence resulted in one of the classic confrontations between Burger and a journalist, this time CBS correspondent Phil Jones.[21]

Jones challenged the chief justice's ban on broadcast news coverage, but Burger claimed Jones's superiors had not asked for his approval. If they did, Jones asked, would Burger allow coverage? The chief refused to give his unconditional affirmation. Later Burger would explain that television lights distracted him from his audience. He also said he did not want to take the risk of being quoted out of context, as he thought broadcast journalists often did. Newspapers tend to be more accurate, Burger said, because they have more time and often have legal specialists covering legal stories.[22]

Nine years later, Chief Justice Burger still insisted that electronic news equipment and reporters not be permitted to cover his annual ABA speech, despite official protests from the major television networks. The president of the ABA promised to consider a change of policy, but asked for cooperation from broadcast journalists in the meantime.[23]

Burger's scorn for journalists was not limited to broadcast newspeople. One writer reported a personal encounter with Burger at the 1978 ABA convention on the same day New York Times

reporter Myron Farber was jailed for refusing to turn over confidential material to a court in a New Jersey murder case. According to Esquire writer Steven Brill, Burger's attitude toward the Farber jailing was close to giddy. "Do you think you have special privileges like this guy Farber does?" Burger reportedly asked.[24]

As Brill pointed out later in the article, it was unwise for Burger to discuss the case, for he may have had to rule on it later. But Brill claimed the incident illustrated the chief justice's attitudes toward the news media, attitudes, Brill said, that were substantiated by other reports and clerks at the Supreme Court:

> Sure, it wasn't smart talking to you about Farber. But it also tells you something more about what he thinks about the press and about his view of the world in general. He has a very narrow view of things, and he doesn't like reporters, and he thinks the First Amendment is just another statute.[25]

The arrogance Burger showed toward journalists was alarming, although it was softened somewhat when Burger considered the news media as allies. In a speech delivered to the 1975 convention of the American Society of Newspaper Editors in Washington, Burger offered an olive branch:

> Far from being "enemies" the media and the judiciary share a need that neither can live without: you must have journalistic independence and judges must have judicial independence.[26]

Burger claimed the continuation of both would maintain democracy. To illustrate his point he referred to Hitler's attempts to destroy a free press and eliminate an independent judiciary.[27] But despite what Burger called interdependence of the two institutions, other parts of the speech clearly indicated who was dependent on whom. "Your fate," he told the editors, "depends on competent, courageous lawyers and competent, independent judges."[28]

The only way journalists would stay free, Burger said, was if there were judges around to keep them free. And the only way to ensure the existence of independent judges was for journalists to help the judiciary respond to attacks. The attacks Burger referred to came primarily in the following forms: expansion of duties without additional staff or judges, salary freezes, and starting salaries inadequate to attract qualified lawyers from lucrative private practices. Burger believed that publicity about the needs of the judicial system was at the heart of the interdependent relationship between the media and the courts.[29]

Burger would have had journalists espousing the judiciary line in other ways, too. Reporters and editors should have a different approach toward the judiciary than that toward the executive or legislative branches of government, Burger said.

Legislators and presidents could respond to press criticisms, but judges could not.[30]

> Therefore, there is at least some obligation on the media to act with the same kind of restraint with which the media expects judges to act.[31]

That meant, Burger believed, dampening criticism of the courts. Burger said restraint was imperative because the news media's decisions were virtually unreviewable, just as the Supreme Court's.[32]

Despite Chief Justice Burger's apparent peaceful overtures, it seemed feasible that his statements delivered directly to journalists can be interpreted as further evidence of his arrogance and cynicism toward the news media. For if one considers his general attitude toward the press, a person could imagine the olive branch as a bribe; reconciliation as disregard for an institution whose members would do anything to survive, even prostitute themselves. One way of interpreting Burger's request for journalistic restraint and journalism response to attacks on the judiciary: the press had better cooperate with the Court or risk the chance of losing the freedoms it now has.

Warren Burger, of course, would have refuted the interpretation, although he indicated an understanding of its origin.[33] He has said he was aware of press disagreement with his belief that First Amendment guarantees for the press were adequate.[34] It seems that at the heart of the disagreeemnt was the contrast in interpreting freedom of the press cases between Burger and members of the news media.

BURGER IN THE COURTROOM

Three themes manifest themselves when one reads Burger's opinions closely: (1) the chief justice preferred not to expand constitutional privileges of journalists in his interpretation of the First Amendment; (2) Burger believed journalists have no greater First Amendment privileges than ordinary citizens; and (3) Burger believed the news media have an unwritten duty to serve their publics responsibly and with restraint.

The non-expansionary concept is one that has been discussed in several studies of the Burger Court. In his introductory comments to a symposium on the Court, Richard Fernston used the source confidence case Branzburg v. Hayes to illustrate the Court's hesitancy to broaden the scope of the Constitution.[35] Fernston argued that the Court was not saying a newsman's privilege was undesirable when it ruled that journalists must appear before grand juries to testify about the commission of crimes. Instead, he said, the Court determined that the privilege is not constitutionally required. Fernston wrote that the Burger Court would have left the question up to the legislative branch, thus showing an unwillingness to expand the First Amendment.[36]

In her 1972 article on the Burger Court, Elizabeth Drew pointed out that judicial conservatives (she placed Warren Burger in that category) are not activists; they don't use the courts to expand rights. But, she said, they aren't given to reversing positions either.[37] The landmark libel case, Gertz v. Robert Welch Inc.,[38] seemed to illustrate Drew's point when the Court said the

press did not enjoy actual malice protection from making false, defamatory statements about a private individual. Chief Justice Burger objected to the court's use of negligence as the standard of liability, claiming it was vague and difficult to interpret.[39] Part of his dissent illustrated his "go-slow" approach:

> I would prefer to allow this area of the law to continue to evolve as it has up to now with respect to private citizens rather than embark on a new doctrinal theory which has no jurisprudential ancestry.[40]

In Houchins v. KQED[41] Burger's majority opinion said the First Amendment provided no guarantee that the news media would have access to prisons. But Burger left open the possibility of the media getting into prisons for news stories:

> Whether the government should open penal institutions in the manner sought by respondents is a question of policy which a legislative body might appropriately resolve one way or the other.[42]

Again an unwillingness to expand the First Amendment by judicial interpretation, a position that some would consider anti-press. But his opinion posed no obstacle to a legislative body's enlarging access by statute. Furthermore, Burger's use of strict constitutional interpretation sometimes directly helped the press.

In Miami Herald v. Tornillo[43] Burger wrote for the Court that deciding what goes into a newspaper was a journalist's job, thereby striking down a Florida right-to-reply statute:[44]

> It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[45] (emphasis added)

Despite so-called pro-press majority opinions such as Miami Herald, skeptics of Burger's intent remained. As one author pointed out, nearly all the press's significant victories in the Supreme Court came in opinions written by Burger. But that same author accused Burger of joining the majority only to be able to assign himself the writing of the opinion. Burger's intent, the writer claimed, was to narrow the scope of the opinion.[46] On the other hand, O'Brien said Burger was a key vote in anti-press decisions:

> In all the genuinely tough cases in which the Court ruled against the news media, Burger was with the majority and frequently provided the fifth vote.[47]

Armstrong and Woodward also wrote at length about the chief justice's tactics when votes were to be counted and opinions assigned.[48] More recently, Schwartz has suggested that Burger used his position to keep court opinions for the press closer to his own philosophy.[49] The thesis that Burger used his vote and his opinion assignment power to limit press freedoms to narrow interpretations of the Constitution may be seen again in Nebraska Press v. Stuart.[50]

In that case Burger reaffirmed the Court's position against prior restraints when he overturned a Nebraska trial judge's gag order against the press.[51] But the concern of First Amendment scholar Benno Schmidt is that Burger left the door open for prior restraints in subsequent cases by only dealing with the Nebraska case and by using the "clear-and-present-danger" test to make the decision. Schmidt said judges could find ways to overcome the "high barriers" to prior restraint, especially if they found alternatives to a gag order were insufficient in ensuring a fair trial.[52]

An earlier prior restraint case probably made Burger more infamous with the press than any other. In his dissent in the Pentagon Papers case,[53] Burger said he believed the Court had been needlessly pressured to hear the case without having all the facts. He bitterly criticized The New York Times for taking four months to analyze the papers before publication without allowing the same opportunity to the court before hearing the case.[54] In New York Times v. United States, Burger came closer than in any other case to expressing in an opinion a personal antagonism toward the press.

Burger also used his Pentagon Papers opinion to argue an equality between the rights and responsibilities of normal individuals and those of the news media. It was with similar reasoning that Burger limited press access to penal institutions in Houchins v. KQED[55] and media access to courtroom proceedings in Richmond Newspapers v. Virginia[56] and Gannett v. DePasquale.[57]

In Houchins Burger admitted the public could make better

decisions on poor prison conditions by receiving more information on the issue, but Burger saw no reason to grant what he considered a special privilege to the news media:

> Like all other components of our society media representatives are subject to limits.[58]

In Richmond Newspapers Burger upheld the right of the press and the public to attend trials (emphasis added), using a footnote to point out that the press has the same rights of access to a trial as the public.[59] One could infer from the footnote and from previous Burger opinions that press rights are no greater nor fewer than the public's.

In the courtroom access case following Richmond Newspapers, the court attached a First Amendment privilege to courtroom access by overturning a Massachusetts statute that excluded the press and public from a courtroom during the testimony of a rape victim.[60] Burger dissented, claiming the Richmond Newspapers decision did not give a First Amendment press right to attend criminal trials in all circumstances. Instead, he said, Richmond Newspapers examined "the right of access traditionally open to the public."[61]

Burger equated the rights of the press and public to trials again in Gannett v. DePasquale when he seemed unequivocal in his desire to keep trials open:

> The public has an interest in observing the performance not only of the litigants and the witnesses, but also of the advocates and the presiding judge.[62]

At the heart of the Gannett case, Burger said, was the fact that it dealt with pretrials, not trials:

> It has never occurred to anyone . . . that a pretrial disposition or pretrial interrogation were other than wholly private to the litigants . . . . For me, the essence of all this is that by definition "pretrial proceedings" are exactly that.[63]

Seven years later, however, Burger apparently had a change of heart--at least to an extent. In Press-Enterprise Co. v. Superior Court (II),[64] the Court reversed a California Supreme Court ruling that preliminary examinations be closed to the press. In the Court's ruling, Burger cited a tradition of openness to the judicial system--especially pretrial hearings--to justify public access in California. And that was the extent of the ruling. One could presume that Burger based his decision strictly on the fact that pretrial hearings in California "are sufficiently like a trial."[65] This interpretation, then, forces one to believe that Burger's extension of openness to pretrials applied only with qualifications.

This Burger opinion provides additional evidence that the former chief justice made favorable decisions for the press on narrow grounds. It does not suggest that failure to extend the rule to pretrial hearings in all states made Burger inflexibly anti-press. It could mean, however, that he maintained healthy skepticism of the news media.

One common thread in these cases and others was Burger's belief that the press had the duty to serve the public responsibly. And underlying many of his opinions is a concern for what he considered poor press performance:

> The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsbily--a duty widely acknowledged but not always observed by editors and publishers.66

Burger also used the concept "fiduciary duty" to interpret the role of the news media in an earlier case:

> It is urged that the claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship.67

The question arises whether Burger intended press freedoms to be linked with the news media's performance. Definitional applications indicate a formal, legal relationship[68] and the connotation of enforcement.[69] Burger has borrowed the phrase, however, not from law, but from poet-journalist Archibald MacLeish.[70] And he has himself ruled out a remedy that would require government action:

> A responsible press is an undoubtably desirable goal, but press responsibility is not mandated by the constitution and like many other virtues, it cannot be legislated.71

Those are revealing words from Chief Justice Burger, for they seemed to indicate a frustration that an ideal cannot be achieved. Despite an animosity toward the press that was

sometimes displayed both in the courtroom and outside it, Burger seemed to realize he was restricted by the law, the interpretation of which he tried to restrict:

> No matter how politcally committed a Justice may be, the ambience and majesty of the nation's highest tribunal often compel him to show some respect for legal precedents that may repel him.72

CONCLUSION

Was Warren Burger's appointment the way Richard Nixon got revenge from the news media? Yes and no. Certainly Burger's unwillingness to expand First Amendment press freedoms is consistent with the concepts of Nixon's 1968 campaign. Burger and the former president share a dislike for the news media that has been displayed in public on numerous occasions. And in at least one Supreme Court case involving a direct conflict between President Nixon and the news media,[73] Burger sided with Nixon.

On the other hand, Burger wrote opinions in cases that were important victories for the press in the 1970s and 1980s, criticism for opinion assignments notwithstanding.

He was neither the champion of the First Amendment portrayed by Denniston, nor the sadistic villain, seemingly ready to censor the press at every opportunity. Chief Justice Warren Burger had strong, controversial opinions about the role of the news media in the United States, but by and large he separated his personal beliefs from actions he took in court.

NOTES

[1] Lyle Denniston, "Today's Godfathers," 64 The Quill 33 at 35.

[2] See Scott Armstrong and Bob Woodward, The Brethren (1979); Tim O'Brien, "The Dubious Justice of Warren Burger," 6 Saturday Review 19; and Robert Sherill, "Injustices on the Burger Court," Playboy, October 1979.

[3] See Thomas Emerson, "Freedom of the Press Under the Burger Court," in The Burger Court: The Counter-Revolution That Wasn't 1 (Vincent Blasi, ed., 1983), pp. 1-27; and Guido H. Stempel, "A Guttman Scale Analysis of the Burger Court's Press Decisions" (Paper presented to the Law Division of the Association for Education in Journalism and Mass Communication, East Lansing, Mich., 1981).

[4] See Thomas A. Schwartz, "Warren E. Burger: Editor-in-Chief Justice of the United States?" (Paper presented to the Law Division of the Association for Education in Journalism and Mass Communication, Athens, Ohio, 1982); and Thomas A. Schwartz, "A First Look at Sandra Day O'Connor and the First Amendment" (Paper presented to the Law Division of the Association for Education in Journalism and Mass Communication, Corvallis, Ore., 1983).

[5] Schwartz, "Warren E. Burger," pp. 9, 15.

[6] Ibid., p.9.

[7] Ibid., p. 16.

[8] See Spiro T. Agnew, "Television News Coverage," 36 Vital Speeches 98.

[9] See Armstrong and Woodward, The Brethren, and Louis M. Kohlmeier Jr., God Save This Honorable Court (1972).

[10] Quote from story by Robert B. Semple Jr., "Warren E. Burger Named Chief Justice by Nixon; Now On Appeals Bench," The New York Times, May 22, 1969, p.1.

[11] Richard M. Nixon, "Acceptance Speech Delivered Before the Republican Convention," 34 Vital Speeches 674 at 676.

[12] Kohlmeier, God Save, pp. 73-89.

[13] "Nixon's Nominee for the Post of Chief Justice," The New York Times, May 22, 1969, p. 36.

[14] "Burger Named," p. 36.

15 "The Chief Justice Asks: 'If It Doesn't Make Good Sense, How Can It Make Good Law?' " New York Times Magazine, Oct. 5, 1969, p. 140.

16 See Stephen Hess, The Washington Reporters (1981).

17 Peter B. Clark, "Adversary Journalism and the Regime." Address given at Michigan State University, East Lansing, Mich., Nov. 14, 1973.

18 Ibid.

19 Ibid.

20 Armstrong and Woodward, The Brethren, pp. 33-35, 174-175.

21 Fred P. Graham, "IRS Chief Urges Jail for Evaders," The New York Times, Feb. 23, 1970, p. 43.

22 Ibid.

23 Linda Greenhouse, "Burger Seeks Study of Bail Releases in Major Crimes," The New York Times, Feb. 12, 1979, p. 14.

24 "Encounter With The Chief," 90 Esquire 13.

25 Ibid., p. 14.

26 Warren E. Burger, "The Interdependence of Judicial and Journalistic Independence," 63 The Georgetown Law Journal 1195 at 1196 (1975).

27 Ibid.

28 Ibid. at 1197.

29 Ibid. at 1200.

30 Burnett F. Anderson, "An Interview With Chief Justice Burger on the Judiciary and the Press," 61 American Bar Association Journal 1352 (1975).

31 Ibid.

32 Ibid.

33 Burger, "Interdependence," at 1195; and Anderson, "An Interview," at 1353.

34 Anderson, "An Interview," at 1353.

35 Richard Fernston, "Foreward: The Burger Court: New Directions in Judicial Policy-Making," 23 Emory Law Journal 643 at 649 (1974).

36 Ibid.

37 Elizabeth Drew "Reports & Comment: Washington, The Nixon Court," 230 Atlantic 6.

38 418 U.S. 323 (1974).

39 Ibid. at 355.

40 Ibid.

41 438 U.S. 1 (1978).

42 Ibid. at 12.

43 418 U.S. 241 (1974).

44 Ibid. at 258.

45 Ibid.

46 O'Brien, "Dubious Justice," p. 21.

47 Ibid. It should be pointed out that O'Brien did not cite specific cases.

48 Armstrong and Woodward, The Brethren.

49 Schwartz, "Warren E. Burger."

50 427 U.S. 539 (1976).

51 Ibid.

52 Benno C. Schmidt, "The Nebraska Decision," 15 Columbia Journalism Review 51 at 53.

53 New York Times Co. v. United States, 403 U.S. 713 (1971).

54 Ibid. at 749.

55 Houchins v. KQED.

56 448 U.S. 555 (1980).

57 443 U.S. 368 (1979).

58 Houchins v. KQED at 8.

59 Richmond Newspapers Inc. et. al. v. Virginia et. al. at 573.

60 Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1981).

61 Ibid. at 613.

62 Gannett v. DePasquale at 394.

63 Ibid.

64 106 S.Ct. 2735 (1986).

65 Ibid. at 2742.

66 Nebraska Press v. Stuart at 560.

67 Miami Herald v. Tornillo at 258.

68 Webster's Third World International Dictionary (1976), p. 845.

69 John Murray, The Media Law Dictionary (1978), p. 40.

70 In William Hocking's Freedom of the Press (1947), the author, a Hutchins Commission member, cites a statement by fellow commission member MacLeish at p. 99.

71 Miami Herald v. Tornillo, at 256.

72 Paul Bender, "The Techniques of Subtle Erosion," 245 Harper's 18.

73 New York Times v. United States.